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Cover Page Footnote

International Law; Commercial Law; Law

**The Development Dilemma:
Reconciling U.S. Foreign Direct Investment in Latin
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A Study of Mexico, The Dominican
Republic and Costa Rica**

*Juan Carlos Linares**

Carmen Vazquez, a woman who works at the Maxell plant in Mexico, makes about 55 pesos a day.¹

In order to buy a gallon of milk for her two kids she has to work more than half a day. It is really difficult for her to feed her family on the wages she is earning. She takes two buses to work and two buses to get home. It costs five pesos each way – that means that she works almost half a day just to get the money to get to work and back. Her solution to this problem, the solution of her family, is that her two kids went to work in the factories when they were 14 and 15 years old. Her youngest one says “[t]here’s really no future for me here; I think eventually what I’m going to do is I’m going to go and try to cross the border and get a job in the United States.”²

Carmen Vazquez and her family exemplify the difficulties faced by millions of workers in developing nations, particularly in Latin America, who attempt to carve out a living from labor in American-owned factories. For decades, the interests of these workers have remained underrepresented,³ allowing labor and

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¹ Symposium, *Workers, Profits and Trade: The Benefits and Burdens of Maquiladoras*, 23 T. JEFFERSON L. REV. 45 (2000) [hereinafter *Workers, Profits, and Trade*].

² *Id.* at 51.

³ Susanna Peters, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 240 (1990).

human rights abuses to run rampant. Yet, U.S. foreign direct investment (FDI) into the region has had an undeniably positive effect on Latin American economies, which endeavor to stay competitive globally, especially during the current economic slump experienced worldwide. Reconciling workers' rights with FDI is indeed a daunting task that must be addressed if U.S.-Latin American economic ties are to continue cordially and productively.

Part I of this paper introduces FDI from the United States into Latin America, and the maquiladora as its labor vehicle. Part II outlines modern theories of economic advantage, which have laid the foundation for international policy and FDI. Part III illustrates the experiences of Latin American nations via Mexico, the Dominican Republic, and Costa Rica, each utilizing different strategies in attracting and retaining FDI. Part IV of this paper draws upon the treatment of workers in maquiladoras and export processing zones (EPZs), the labor standards imposed upon those areas, and the enforcement mechanisms that are in place. Part V summarizes the benefits and burdens of FDI into Latin American industrial enclaves by applying economic theory, forecasting future investment into Latin America, and posing a solution to the reconciliation problem.

I. Introduction

Currently, countries that account for 70% of the world populations receive less than 10% of the world's trade and investment, with the least developed countries composed of 10% of the population receiving less than 2%.⁴ Without a doubt, foreign investment is imperative for the economic advancement of developing nations, particularly in Latin America. Undercapitalized nations, especially those with limited economic infrastructure, "can piggyback on the wide distribution of skills, knowledge, communications systems and capital" that result from investment from around the world.⁵ A common strategy of these

⁴ Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 784 (2001).

⁵ G. Pascal Zachary & Robert Frank, *High-Tech Hopes*, WALL ST. J., Sept. 25, 2000, at R4.

nations in attracting foreign investors has been to establish, promote, and maintain low-wage export industries for use by foreign, and especially U.S., industrial interests.⁶ This strategy has spawned the growth of the EPZ and the maquiladora,⁷ unique manufacturing sectors that cater to and support the low-cost objectives of foreign investors.⁸

Fundamentally, the purpose of establishing EPZs and maquiladoras was to “provide foreign investors and their subcontractors with freedom from duties on the capital equipment and components used in assembly operation, to enable them to operate with modern infrastructure, and to offer them sanctuary from the adverse business conditions (red tape, corruption, delays) evident in other parts of [Latin American] economies.”⁹ “Enclave enterprises” have developed from these EPZs, where labor communities have unfolded on regional scales.¹⁰ That is, job seekers have formed “special reserve pool[s] of unskilled labor from which they can be pulled at any time to fulfill specific requirements of international capital.”¹¹ Consequently, countless workers have uprooted themselves from their familial territories, only to find themselves unexpectedly as permanent fixtures in overcrowded and overrun industrial sites, living and working in squalid conditions.

As a result of these conditions, labor rights proponents have attacked maquiladoras and EPZs, labeling many as sweatshops.¹²

⁶ THEODORE H. MORAN, BEYOND SWEATSHOPS: FOREIGN DIRECT INVESTMENT AND GLOBALIZATION IN DEVELOPING COUNTRIES 17 (2002).

⁷ See generally <http://www.dictionary.com> (last visited Nov. 2, 2003) (defining the maquiladora as an “assembly plant in Mexico, especially one along the border between the United States and Mexico, to which foreign materials and parts are shipped and from which the finished product is returned to the original market.”).

⁸ See Aureliano Gonzalez Baz, *Manufacturing In Mexico: The Mexican In-Bond (Maquila) Program*, at <http://www.udel.edu/leipzig/texts2/vox128.htm> (last modified June 3, 1996) (providing a general background for maquiladoras).

⁹ See MORAN, *supra* note 6, at 17.

¹⁰ See Maria L. Ontiveros, *A Vision of Global Capitalism That Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 34 (1999).

¹¹ *Id.* (quoting Cecilia Green, *At the Junction of the Global and the Local: Transnational Industry and Women Workers in the Caribbean*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 118 (Lance A. Compa & Stephen F. Diamond eds., 1996)).

¹² Sheryl Dickey, *The Free Trade Area of the Americas and Human Rights*

Partially blamed are governments of target FDI nations, which have been "pressured to lower or maintain low labor standards to attract and keep foreign direct investment."¹³ Undoubtedly, "conditions in these foreign-owned and subcontractor plants have offered extensive evidence of harm, and of the exploitation and abuse of workers."¹⁴ "Surveys by the International Labor Organization (ILO), on the other hand, have regularly found that the pay for workers in maquiladoras, while extremely low by the standards of developed countries, is higher than what would be available in the villages from which the workers come."¹⁵ The premise of this piece is that adherence to recognized labor rights and standards are inevitably essential to the attraction and maintenance of FDI and, in turn, the economic well-being of both the United States and its Latin American neighbors. Accordingly, observance of workers' rights is "a floor below which production should be considered illegitimate."¹⁶

II. Economic Theories of Foreign Direct Investment

"Understanding the economic theory behind trade policy is an important tool" for understanding the trade and investment agreements undertaken by the United States and Latin American nations.¹⁷ Over two centuries ago, "[l]iberal economic theorists, particularly Adam Smith and David Ricardo, sought to demonstrate that free markets unfettered by state regulation would result in the greatest prosperity for all."¹⁸ These theories were, in

Concerns, 8 No. 3 HUM. RTS. BRIEF 26, 26 (2001) (defining sweatshops as "workplaces with exploitative conditions, including hazardous working conditions, lack of a living wage, denial of basic benefits, and intimidation and violence directed towards workers advocating for independent unions.").

¹³ *Id.*

¹⁴ MORAN, *supra* note 6, at 11.

¹⁵ *Id.* at 13.

¹⁶ Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 32 (1999); *see also* MORAN, *supra* note 6, at 7 (explaining that countries are best served when they adopt a "build-up" approach rather than a "trickle-down" approach to capturing the benefits of foreign direct investment.").

¹⁷ Jeffrey Simser, *GATS and Financial Services: Redefining Borders*, 3 BUFF. J. INT'L L. 33, 41 (1996).

¹⁸ Davis & Neacsu, *supra* note 4, at 758 (quoting Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 623 (1998)).

time, modified and adjusted to take into account advances in technology and international trade agreements.

A. Adam Smith – Absolute Advantage Theory

Adam Smith revolutionized economic theory in the late 1700s. Prior to his notable publications, the economies of the Western World adhered to the theories of mercantilism. “[M]ercantilist theory held that trade was a kind of sum-zero game in which the country with the greatest absolute advantage was able to profit at the expense of less advantageous ones.”¹⁹ Favorable balances of trade were viewed as essential for domestic reasons and were inextricably tied to national security issues.²⁰ “Exports represented a net profit while imports were a failure and a net loss.”²¹ Accordingly, “measures to increase exports were valuable while tariffs to prevent imports were desirable.”²²

“Adam Smith challenged the premises of Mercantilism, arguing that the goal of a nation was not to accumulate precious metals, but rather to satisfy the consumer needs of citizens.”²³ He wrote:

The two principles being established, however, that wealth consisted in gold and silver, and that those metals could be brought into a country which had no mines only by the balance of trade, or by exporting to a greater value than it imported; it necessarily became the great object of political economy to diminish as much as possible the importation of foreign goods for home-consumption, and to increase as much as possible the exportation of the produce of domestic industry. Its two great engines for enriching the country, therefore, were restraints upon importation, and encouragements to exportation.²⁴

Smith further criticized mercantilist theory in that “trade amongst

¹⁹ *Id.* at 753; see also Simser, *supra* note 17, at 41 (defining the sum-zero game as “the gain of country A” coming “invariably at the expense of country B.”).

²⁰ See Gerald A. Bunting, *GATT and the Evolution of the Global Trade System: A Historical Perspective*, 11 ST. JOHN’S J. LEGAL COMMENT. 505, 507 (1996).

²¹ Davis & Neacsu, *supra* note 4, at 753.

²² *Id.*

²³ Simser, *supra* note 17, at 41.

²⁴ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 286 (Kathryn Sutherland ed., World’s Classics 1993) (1776).

nations was not a sum-zero enterprise but rather an evolving source of wealth from which the most competitive will reap the greatest reward."²⁵

B. David Ricardo – Comparative Advantage Theory

David Ricardo recognized, but refined Smith's notion of absolute advantage. According to Ricardo, absolute advantages were unnecessary in the overall context of trade between two nations as long as each country could profit by trading with the other, even assuming one country could theoretically produce all of the traded goods more efficiently.²⁶ Essentially, states should "trade those goods that they can produce comparatively more cheaply than can other states, and that comparative advantage stems from differences in factor prices."²⁷ Ricardo believed that:

Though that one country might have absolute advantages, it behooves it to engage in those traded goods (or services, today) in which it has a comparatively greater advantage, and purchase the remaining goods from its partner(s), who profit by those exports and purchase goods (or services) from the first at a lower price than they could producing for themselves. Thus, each country will invest in that over which it has a greater comparative, not absolute, advantage making a greater profit from its partner(s) than if it supplied itself, with each country profiting to the extent of its comparative advantages.²⁸

Ricardo aptly illustrated that each nation should export items that can be produced efficiently and import everything else.²⁹ His law of comparative advantage concluded that "all nations, not just the richest or most powerful, can profit from unhindered international trade, since each country can exploit and thus profit from its own particular advantages, even while it pays others for goods produced elsewhere."³⁰ "Even if the home country could

²⁵ Simser, *supra* note 17, at 41.

²⁶ Davis & Neacsu, *supra* note 4, at 753.

²⁷ Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 9 (1995).

²⁸ Davis & Neacsu, *supra* note 4, at 753-54.

²⁹ Simser, *supra* note 17, at 42-43.

³⁰ Davis & Neacsu, *supra* note 4, at 733; see also Paul R. McDaniel, *The Pursuit of National Tax Policies in a Globalized Environment: Trade and Taxation*, 26 BROOK. J.

produce everything more cheaply than the foreign, it is better to concentrate on those industries that yield the highest profit rate, exporting them and purchasing foreign goods, even if at a somewhat higher price than they could be otherwise purchased at home.”³¹ Comparative advantage, however, rests on the proposition that countries like those in Latin America “differ in their ability to produce particular goods or provide needed services.”³²

C. *The Heckscher-Ohlin Model*

Eli Heckscher³³ and Bertil Ohlin,³⁴ two Swedish economists, modernized Ricardo’s theory, “explaining that in addition to simple comparative advantage, countries will exploit their most abundant resources even if it violates basic comparative

INT’L L. 1621, 1625 (2001) (advancing Ricardo’s notion that the “welfare of residents of all countries is enhanced if they can purchase goods and services at their lowest prices on the world market. A nation need not be absolutely more efficient than another in order to benefit by trading with the other.”).

³¹ Davis & Neacsu, *supra* note 4, at 753; see also DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1819), *microformed on* No. 49280 (Early American Imprints). Two of Ricardo’s famous paragraphs are particularly relevant:

England may be so circumstanced, that to produce the cloth may require the labour of 100 men for one year; and if she attempted to make the wine, it might require the labour of 120 men for the same time. England would therefore find it her interest to import wine, and to purchase it by the exportation of cloth.

To produce the wine in Portugal, might require only the labour of eighty men for one year, and to produce the cloth in the same country, might require the labour of ninety men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place, notwithstanding that the commodity imported by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labor of ninety men, she would import it from a country where it required the labour of 100 men to produce it because it would be advantageous to her rather to employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of vines to the manufacture of cloth.

Id.

³² McDaniel, *supra* note 30, at 1625.

³³ Eli Heckscher, *The Effect of Foreign Trade on the Distribution of Income*, in READINGS IN THE THEORY OF INTERNATIONAL TRADE 272 (Howard H. Ellis et al. eds., Blakiston Co. 1950).

³⁴ BERTIL OHLIN, INTERREGIONAL AND INTERNATIONAL TRADE (rev. ed. 1967).

advantage.”³⁵ The Heckscher-Ohlin theorem, also known as the factor endowment approach, modified comparative advantage to account for the fact that a nation may still produce a product in which it does not have an advantage.³⁶ In essence, “nations with an abundance of capital will have a comparative advantage in capital intensive industries, while nations with an abundance of labor will have a comparative advantage in labor intensive production.”³⁷

Under a two-pronged analysis, the Heckscher-Ohlin model theorizes that (1) commodities differ in factor requirements; and (2) countries differ in factor requirements. Here, countries have a comparative advantage in using abundant factors intensively. Thus, countries with abundant capital will engage in capital-intensive industries and labor-rich countries will engage in labor-intensive activities. Nations, including those of Latin America, have indeed benefited economically by respecting the wisdom of the Heckscher-Ohlin theorem.

III. Foreign Direct Investment

In general, the advantage of FDI is the generation of significant resource flows to the country and improvement of its exports, employment, and income situations, while not adding to a country's debt.³⁸

³⁵ Davis & Neacsu, *supra* note 4, at 755-56 (explaining that “comparative advantage did not explain why even advanced economies frequently engaged in activities that might be more efficiently performed by others. . . . It, like laissez faire capitalism, has been roundly criticized and often rejected by modern economic theory,” which notes that the term comparative advantage has been used by economists in different and often incongruent ways).

³⁶ See Simser, *supra* note 17, at 42.

³⁷ *Id.* at 42-43; see also Anthony Scaperlanda, *Trade in the 1990's: Is an International Organization for Multinational Enterprises Needed?*, 14 N. ILL. U. L. REV. 421, 422 (1994) (discussing that the explicit assumption underlying all trade theory is that factors of production, including FDI, do not move internationally).

³⁸ Michael Cornell Dypski, *The Caribbean Basin Initiative: An Examination of Structural Dependency, Good Neighbor Relations, and American Investment*, 12 J. TRANSNAT'L L. & POL'Y 95, 115 (2002); see also 15 C.F.R. § 806.15(a)(1) (2003) (defining foreign direct investment in the United States as “the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.”).

As of 1991, the United States accounted for approximately 25% of the world's total FDI share, with Western Europe as a region accounting for over 50% and Japan for 12.6%.³⁹ United States firms have, however, contributed much of the capital invested in Latin America and its maquiladora communities. Three nations in particular – Mexico, the Dominican Republic, and Costa Rica – portray varied experiences in attaining FDI and maintaining workforces of assorted skill levels.

A. Mexico

“No country in the world has a greater impact on the daily life of Americans than does Mexico.”⁴⁰ An important trading partner, Mexico receives approximately 75% of its imports from the United States and directs approximately 85% of its exports there.⁴¹ Investment of the U.S. dollar from across the border is key to industrial growth and development in Mexico.⁴² For several years, Mexico has focused on the maquiladora industry as the main source of drawing dollars into its economy.⁴³ In fact, the maquiladora industry is the only sector with sustained economic growth throughout the 1990s, with \$3.6 billion invested from 1998-2000 in Mexico.⁴⁴

Historically, the Mexican government held fast to a strict protectionist economic policy as the ruling party, the Institutional Revolutionary Party (PRI), sought to solidify its grasp of the Mexican economy.⁴⁵ During the 1980s, however, comprehensive trade reform led to the opening of Mexico's borders to foreign trade and investment.⁴⁶ In fact, most, if not all, of the FDI in Mexico is due to the Mexican government's unilateral

³⁹ Scaperlanda, *supra* note 37, at 424 (1994).

⁴⁰ Hale E. Sheppard, *Salvaging Trade and Political Relations with Mexico in the Aftermath of the Terrorist Attacks: A Call for a Reevaluation of U.S. Law and Policy*, 20 B.U. INT'L L.J. 33 (2002) (quoting the U.S. ambassador to Mexico).

⁴¹ *Id.* at 34.

⁴² *Workers, Profits, and Trade*, *supra* note 1, at 48.

⁴³ *Id.* at 48-49.

⁴⁴ *Id.* at 49.

⁴⁵ See Gordon H. Hanson & Ann Harrison, *Trade Liberalization and Wage Inequality in Mexico*, 52 INDUS. & LAB. REL. REV. 271, 274-75 (1999).

⁴⁶ *Id.* at 275.

determinations in the late 1980s "to liberalize and open the economy, and to abandon its earlier protectionist policy."⁴⁷ The North American Free Trade Agreement (NAFTA) was a confirmation of this change within Mexico, "not the cause of it."⁴⁸ Consequently, the Mexican government removed many barriers to foreign investment.⁴⁹ Among the notable ones were "limits on the foreign share of equity ownership in a Mexican firm and requirements that foreign firms obtain government approval for technology transfer from abroad and other activities."⁵⁰ "Many of these economic modifications were codified in 1989."⁵¹

As a result of economic modifications made in the late 1980s, an influx of FDI into the Mexican maquiladora industry soon followed. Up until the 1990s, the majority of the maquiladoras were along the border with the United States.⁵² Now, only 67% of maquiladoras are in the border regions, reflecting a positive change as problems including high turnover and a lack of technically skilled people have traditionally been common in that region.⁵³ The remainder of maquiladoras are scattered within the nation's interior, employing a growing number of technically skilled people from the respective state.⁵⁴

In 1993, a monumental step in the direction of Mexican economic growth occurred when Mexico, Canada, and the United States signed NAFTA.⁵⁵ In ratifying the document, the three nations intended to "promote economic development by eliminating obstacles to free trade in goods, capital and services" among them.⁵⁶ Soon afterwards, over a million Mexicans were at

⁴⁷ See Christopher L. Erickson and Daniel J.B. Mitchell, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41, 62 (1999).

⁴⁸ *Id.*

⁴⁹ Hanson & Harrison, *supra* note 45, at 275.

⁵⁰ *Id.*

⁵¹ *Id.* at 275.

⁵² *Workers, Profits, and Trade*, *supra* note 1, at 49.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (effective Jan. 1, 1994) [hereinafter NAFTA].

⁵⁶ John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study*, 7 AM. U. J. GENDER SOC. POL'Y & L. 179, 182 (1999).

work in newly constructed, American-owned maquiladoras in the northern industrial border region.⁵⁷

Under the tariff-free protections of NAFTA, multinational corporations have sent the assembly work across the border for process and completion in Mexico's low wage areas.⁵⁸ People in Mexico, who are far less skilled than workers in the United States, Europe, or Japan, perform this assembly work.⁵⁹ In supply terms, less than 2% of component parts that are utilized in the final products, and re-exported out of Mexico, are generated in Mexico.⁶⁰ "That means that there are very few suppliers in Mexico that are involved in this industry, and therefore, it has been classified more or less, informally, as an 'enclave economy.'"⁶¹

In spite of these labor-saturated enclaves, FDI has indeed diversified the Mexican economy.⁶² Industries ranging from textile producers to technology magnates like General Electric have sent vast amounts of investment capital into Mexico to take advantage of NAFTA and the seemingly unlimited supply of maquiladora labor. In recent years, FDI has also led to the increase in Mexican per capita income from \$8,838 in 1980 to \$9,532 in 2000.⁶³ Opponents of NAFTA and U.S. FDI in Mexico, however, point out that the increase in income and wages has not been equally distributed among the Mexican populace.⁶⁴

B. The Dominican Republic

The Dominican Republic is a representative Caribbean nation

⁵⁷ Dickey, *supra* note 12, at 27.

⁵⁸ See *Workers, Profits, and Trade*, *supra* note 1, at 45.

⁵⁹ See *id.*

⁶⁰ *Id.* at 47. (explaining that "[i]n the manufacturing process, there are at least five identifiable stages: (1) research and development, (2) manufacturing and component parts, (3) assembly, (4) testing, and (5) distribution to the final end user.").

⁶¹ *Id.*

⁶² Isa, *supra* note 56, at 197.

⁶³ See SURJIT S. BHALLA, INSTITUTE FOR INTERNATIONAL ECONOMICS, IMAGINE THERE'S NO COUNTRY: POVERTY, INEQUALITY, AND GROWTH IN THE ERA OF GLOBALIZATION 221 (2002).

⁶⁴ See Hanson & Harrison, *supra* note 45, at 276 (demonstrating that "between 1984 and 1990, average real hourly wages for white-collar workers increased by 13.4%, while those for blue collar workers decreased by 14%.").

with a largely unskilled labor pool that in recent years has spawned intense FDI. Historically, the Dominican Republic, like most Latin American nations, followed the Structural Dependency Theory.⁶⁵ Under this theory, nations of Latin America and the Caribbean, including the Dominican Republic, lingered under an economic "form of colonialism."⁶⁶ In time, the Structural Dependency Theory crumbled as advocates of foreign intervention in the region supported "public economic assistance, private investment, and trade preferences."⁶⁷ Caribbean nations also sought greater democratization, economic liberalization, and⁶⁸ employment in its poorer areas.⁶⁹

The United States responded to these changes with the Caribbean Basin Initiative (CBI), designed to deter "communist inspired revolution through a comprehensive trade and aid policy."⁷⁰ The CBI united Latin American nations like the Dominican Republic and Costa Rica (discussed *infra* in Part III-C) into a single strategic area "that would benefit from more liberal access to America's markets, greater economic assistance, and more incentives for capital investment."⁷¹

⁶⁵ Dypski, *supra* note 38, at 98 (defining the Structural Dependency Theory "as visualiz[ing] the world economy in terms of a 'center-periphery' structure, with capitalist-industrialized nations forming the center and the developing-underdeveloped world at the periphery.").

⁶⁶ *Id.* (quoting G. POPE ATKINS, *LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM* 348 (3d ed., Westview Press 1995)).

⁶⁷ *Id.*; see also ROBERT H. FERRELL, *AMERICAN DIPLOMACY* 765-793 (3d ed. 1975) (providing a broad historical introduction to changes in U.S. policy in the Caribbean during the 1960s).

⁶⁸ See Dypski, *supra* note 38, at 98.

⁶⁹ See MORAN, *supra* note 6, at 34.

⁷⁰ Dypski, *supra* note 38, at 100; see also Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 233, 247 (1999) ("Bilateral trade agreements like the Caribbean Basin Initiative, which served to spur foreign assembly plants in the Caribbean to take advantage of low labor costs, gave the development of export-assembly industries some momentum.").

⁷¹ Dypski, *supra* note 38, at 100 (quoting MICHAEL J. KRYZANEK, *U.S.-LATIN AMERICAN RELATIONS* 80 (2d ed. 1990)); see also Andrew Bittens, *Trade Conditionality and the Crane Bill: Rewarding Caribbean Basin Nations for Human Rights Failures*, 6 CARDOZO J. INT'L & COMP. L. 159, 159 n.5 (1998) (noting that member nations of the CBI include Anguilla, Antigua, the Bahamas, Barbados, Belize, Bermuda, the British Virgin Islands, the Cayman Islands, Costa Rica, Dominica, the Dominican Republic, El

The first phase of the CBI, called the Caribbean Basin Economic Recovery Act (CBERA), was signed into law by President Reagan in 1983,⁷² giving Caribbean exports preferential treatment in the United States.⁷³ Section 212(C) of the initiative identified, *inter alia*, certain minimum conditions that CBI nations should follow in order to qualify for the programs, including economic conditions, living standards, and other relevant economic factors of the country.⁷⁴ President Bush signed the second phase of the CBI into law in 1990.⁷⁵ Named the "Expansion Act," it "provides greater coverage of Caribbean articles eligible for duty-free treatment and places more pressures upon the CBI states to ensure worker's rights and provides tax incentives for foreign direct investment from the United States into the area."⁷⁶ The inception of NAFTA in 1994, however, abated many of the CBI's advantages. To offset the unintentional advantages Mexico received as a result of NAFTA over Caribbean basin nations,⁷⁷ and "to instill confidence in the Caribbean leadership of the dedication of the United States to free trade and greater investment in the CBI members," a final phase of CBI was enacted.⁷⁸ On May 18, 2000, President Clinton signed into law the Trade and Development Act of 2000.⁷⁹

Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, the Netherlands Antilles, Nicaragua, Panama, Saint Christopher-Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago, and the Turks and Caicos Islands).

⁷² Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (codified at 19 U.S.C. §§ 2701-2706, 16 U.S.C. § 7652 (Supp. 1983)) [hereinafter CBERA].

⁷³ Bittens, *supra* note 71, at 159 (noting that "[d]esignation as a beneficiary country had the effect of granting duty-free treatment to nearly all articles grown, produced or manufactured in the beneficiary country" with certain exceptions).

⁷⁴ CBERA, *supra* note 72, at 19 U.S.C. § 2702(c)(2); *see also* Dypski, *supra* note 38, at 104.

⁷⁵ Customs and Trade Act of 1990, Pub. L. No. 101-382, 104 Stat. 629 (1990) (codified in scattered sections of 19 U.S.C.).

⁷⁶ Dypski, *supra* note 38, at 108.

⁷⁷ *See* Hale E. Sheppard, *Partial Revocation of the Caribbean Basin Trade Partnership Act: An Analysis of Hemispheric Injuries and Domestic Benefits*, 28 N.C. J. INT'L L. & COM. REG. 135, 136 (2002).

⁷⁸ Dypski, *supra* note 38, at 111-12.

⁷⁹ Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000)

Since its inception, the Dominican Republic, as one of the larger and more diversified Caribbean basin states, has been a major beneficiary of the CBI program.⁸⁰ American corporations have invested largely in Dominican EPZs.⁸¹ United States FDI has concentrated in manufacturing, specifically in "export processing zones where footwear, apparel, and to a lesser extent, electronic products and medical goods are assembled from U.S. components and materials and then exported back to the United States."⁸² As a result, Dominican manufacturing sectors in the 1990s grew at a sharp rate. In fact, during that time, the clothing industry in the Dominican Republic accounted for almost 50% of all national exports to the United States, in contrast to 10% in 1980.⁸³ In 2000, the Dominican Republic received a total of \$1.338 billion in FDI from 481 firms, "more than 25% of the Caribbean region's total,"⁸⁴ while 196,924 jobs were created.⁸⁵ Also, per capita income in the island nation rose from \$4,358 in 1980, one of the lowest in the hemisphere, to \$6,217 in 2000.⁸⁶

It was the country's unskilled labor pool that was the key to this development, with 85% of the starting labor force in Dominican EPZs coming from this source.⁸⁷ Nonetheless, much of the FDI directed at the Dominican Republic landed in Santo Domingo, the capital, where U.S. investors had access to "more skilled or more easily trained labor," rather than settling for the cheapest sources of labor to manufacture the more sophisticated products.⁸⁸ Moreover, on-the-job training and learning-by-doing

(codified in scattered sections of 19 U.S.C.); *see also* Dypski, *supra* note 38, at 108.

⁸⁰ Dypski, *supra* note 38, at 117 (explaining that 19 U.S.C. § 2702(b)(1) included the states of the Caribbean in a NAFTA-like arrangement of free trade and tariff treatment).

⁸¹ *Id.* at 116.

⁸² *Id.* at 122.

⁸³ Dypski, *supra* note 38, at 116 (indicating that other export intensive products include "cigars, raw sugar, circuit parts, electronic transformers, and beer made from malt.").

⁸⁴ Dypski, *supra* note 38, at 121 (revealing that U.S. FDI in the Dominican Republic reached \$535 million).

⁸⁵ MORAN, *supra* note 6, at 37.

⁸⁶ BHALLA, *supra* note 63, at 221.

⁸⁷ MORAN, *supra* note 6, at 36.

⁸⁸ *Id.* at 34 ("Despite the added cost, survey data indicate that the foreign firms

programs offered by some U.S. firms to unskilled workers has resulted in a 44% productivity increase in the second year of operations⁸⁹ and, more importantly, a permanent pool of skilled labor. Yet, doubt about worker retention in many EPZs has reduced the incentive of U.S. corporations to train their employees, "leading to under-investment in human resource development."⁹⁰

The Dominican EPZs have indeed not been without controversy. The Dominican Republic's remarkable growth from the liberal infusion of FDI in the 1990s has been unable to veil a "history of tyrannical dictatorship, pandemic corruption, . . . labor and social unrest, a history of expropriation and insufficient compensation, and weak adherence to dispute settlement mechanisms."⁹¹

C. Costa Rica

In contrast to the Dominican Republic, Costa Rica demonstrates a Latin American nation's inventive efforts to encourage FDI through government participation. "A dedication to attracting high quality FDI, an active promotion program (The Costa Rican Coalition for Development Initiatives), a highly-educated workforce, and economic/political stability make Costa Rica one of the most attractive beneficiaries of CBI treatment."⁹²

The attractiveness of Costa Rica is due to three investor-friendly characteristics. First, "Costa Rican law treats foreigners and nationals identically because the country's constitution

were willing to pay the premium rents because the better working environment served their 'production needs' or better reflected their 'corporate image.'").

⁸⁹ *Id.* at 36.

⁹⁰ *Id.* at 37.

⁹¹ Dypski, *supra* note 38, at 122; *see also* Jose De Cordoba, *With a Banker Facing Charges, a Nation Questions Its Success*, WALL ST. J., June 30, 2003, at A1 (reporting that Ramon Baez, President of the Dominican Baninter bank, was arrested on charges of fraud, money laundering and tax evasion. The scandal has tarred dozens of leading figures from all sectors of Dominican national life – from past and current Presidents, to leading journalists and justices of the Supreme Court – many of whom allegedly received lavish gifts or regular payments from the bank); *A Spectacular Fall from Grace- The Dominican Republic's Fall From Grace*, ECONOMIST, Dec. 13, 2003, at 52.

⁹² Dypski, *supra* note 38, at 121.

prohibits discrimination against foreigners.”⁹³ “Foreign investors enjoy the same rights as nationals to form and operate any bona-fide business in Costa Rica.”⁹⁴ Second, as a signatory member of the CBI, Costa Rica receives duty-free treatment for approximately 4,000 products, “helping Costa Rica diversify its exports and increase bilateral trade with the U.S.”⁹⁵ Also, while FDI did not reach the levels achieved during 1998-1999, resulting from the major investment by Intel, Costa Rica still received \$457 million in FDI in 2001,⁹⁶ making it one of Latin America’s most rapidly developing countries.⁹⁷ Except for state-controlled monopolies in certain sectors, no major “barriers exist in regards to FDI in Costa Rica.”⁹⁸ Third, Costa Rica has “eliminated import taxes on computer-related equipment, adopted an aggressive policy upgrading information technology facilities in schools, and strengthened its intellectual property laws.”⁹⁹ It has also

successfully assembled an incentive package that included an eight-year income tax exemption, with a subsequent four-year period of 50% reduction in the country’s 30% income tax rate, duty free import of raw materials, and free movement of capital[, all] in order to land a \$300 million semiconductor test and assembly plant established by Intel outside the Costa Rican city of San Jose.¹⁰⁰

The Intel plant has become a well-documented example of

⁹³ Alejandro Ferrate, *Foreign Direct Investment in Costa Rica After the “Death” of CBI*, 2 J. INT’L LEGAL STUD. 119, 137 (1996).

⁹⁴ *Id.*

⁹⁵ Dypski, *supra* note 38, at 120.

⁹⁶ U.S. DEPT. OF STATE, 2001 COUNTRY REPORTS ON ECONOMIC POLICY AND TRADE PRACTICES, at <http://www.state.gov/documents/organization/8200.pdf> (Feb. 2002).

⁹⁷ Dypski, *supra* note 38, at 120-21. (“While entrenched U.S. investors such as Dole and Chiquita remain in Costa Rica, newer investments taking advantage of CBI have included manufacture or assembly of electronic components, telecommunications equipment, machinery, consumer goods, electrical appliances, up scale apparel products, toys, sporting goods, selected leather products and health and natural, resource-based products, including food processing and agro-industrial products.”).

⁹⁸ *Id.*; see also Ferrate, *supra* note 93, at 138 (explaining that the state holds monopolies on insurance, checking accounts, hydrocarbon and mineral extraction, refining, and the operation of seaports and airports).

⁹⁹ Len Cao, *Corporate and Product Identity in the Post-national Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 440 n.160 (2002).

¹⁰⁰ *Id.* at 439 n.159.

Costa Rica's efforts to attract and maintain high-caliber FDI. Intel announced in 1996 its decision to locate the company's new facility in Costa Rica and employ 3,500 workers to produce its processors, representing the largest single investment yet made by any firm in Central America.¹⁰¹ Within two years, Intel's FDI had generated approximately \$700 million in annual exports, surpassing coffee and bananas, Costa Rica's two main traditional products, combined.¹⁰²

In addition to Costa Rican EPZs, such as the Intel plant, Free Trade Zones (FTZs), have become "the backbone of Costa Rica's export and investment promotion."¹⁰³ Costa Rican FTZs housed eighty-five Fortune 500 companies by the year 2000 and became the most export-intensive economy in Latin America,¹⁰⁴ helping to raise employee wages in the manufacturing sector to an average of \$2.21 an hour, and \$3.36 an hour at Intel.¹⁰⁵ Moreover, Costa Rica's per capita income rose from an already impressive \$7,399 in 1980 to \$8,878 in 2000.¹⁰⁶

On a training level, between 1997 and 1999, enrollment in engineering studies at Costa Rican universities doubled,¹⁰⁷ demonstrating the nation's commitment to supplying investors with a skilled labor pool. This, along with its advantages granted under the CBI, and its history of good-neighbor relations with the United States, has lured FDI to Costa Rica on a grand scale. Costa Rica remains a model example to Latin American nations wishing to benefit from American trade policy and FDI.

IV. The Treatment of Workers

FDI is clearly imperative to the current and future economic

¹⁰¹ MORAN, *supra* note 6, at 41.

¹⁰² *Id.*

¹⁰³ Ferrate, *supra* note 93, at 143-44.

¹⁰⁴ MORAN, *supra* note 6, at 42; *see also* Ferrate, *supra* note 93, at 143-44 (explaining that well-known U.S. companies investing in Costa Rica include Avon, Conair, GTE Corporation, Gerber, Levi Strauss & Company, Pfizer, and the Van Heusen Company).

¹⁰⁵ MORAN, *supra* note 6, at 41.

¹⁰⁶ BHALLA, *supra* note 63, at 221.

¹⁰⁷ MORAN, *supra* note 6, at 41 ("By 2000, 847 students were enrolled in the engineering program at the Institute for Technology.").

development of Latin American nations. Employment generated from EPZs and maquiladoras has surely given laborers wage-earning opportunities they otherwise would not have. Nevertheless, working conditions in these plants for both skilled and unskilled laborers should not be overlooked. Indeed, nations, organizations, and the workers themselves have set minimum standards of work conditions in EPZs and maquiladoras. The enforcement of these standards, though, has become a common and controversial issue for both the investor and the laborer.

Interestingly, economists and social activists have referred to substandard working conditions and low wages of manual laborers in the developing countries as a "race to the bottom."¹⁰⁸ That is, to minimize labor costs and attract FDI, firms have sacrificed their workers' health, dignity, and ability to earn a living wage.¹⁰⁹

A. Standards

Labor rights opponents argue that labor standards are encouraged merely to act as "disguised protectionism, aimed at keeping [developing nations'] goods out of major markets."¹¹⁰ They further argue that labor standards are a nation's own concern, that internal decisions should dictate labor policy free of foreign pressures.¹¹¹ If labor rights are to be universally recognized and enforced, however, international bodies with extraterritorial reach must play a significant role in setting these norms.¹¹²

1. International "Core" Labor Standards

The United Nations has sponsored three multilateral instruments that treat human rights matters as well as economic and social issues.¹¹³ They are the Universal Declaration of Human

¹⁰⁸ See *The Rights of Workers: A 'Race to the Bottom'?*, at <http://www.business.uconn.edu/redirect/CIBER/sitefiles/resourceguides/vol3/3-3.3.pdf> (last visited Nov. 2, 2003).

¹⁰⁹ *Id.*

¹¹⁰ Erickson & Mitchell, *supra* note 47, at 42.

¹¹¹ See *id.* at 42-43.

¹¹² See Lance Compa, *The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection*, 31 CORNELL INT'L L.J. 683, 697 (1998).

¹¹³ *Id.* at 695.

Rights,¹¹⁴ the International Covenant on Civil and Political Rights,¹¹⁵ and the International Covenant on Economic, Social, and Cultural Rights.¹¹⁶

Originally, however, the notion of setting labor standards began with the ILO.¹¹⁷ Conceived after World War I, the ILO was an appropriate forum where "labor unions, management, and government could develop mutually beneficial solutions to their problems."¹¹⁸ Currently, the ILO, as an international body, "undertakes research, offers technical assistance, and provides a channel for intergovernmental programs aimed at elevating labor standards."¹¹⁹

The ILO's 1998 Declaration on Fundamental Principles and Rights at Work is a competent attempt to establish a comprehensive list of core labor standards, listing its fundamental principles as: (1) the elimination of discrimination in respect of employment and occupation; (2) the elimination of all forms of forced compulsory labor; (3) the effective abolition of child labor; and (4) freedom of association and the effective recognition of the right to collective bargaining.¹²⁰ Under ILO law, whether or not a

¹¹⁴ G.A. Res. 217 (III)(A), U.N. GAOR, 3d Sess., Pt.1, at 71, U.N. Doc. A/810 (1948) (establishing that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

¹¹⁵ G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

¹¹⁶ *Id.* at 49.

¹¹⁷ MORAN, *supra* note 6, at 47.

¹¹⁸ Erickson & Mitchell, *supra* note 47, at 47; *see also Declaration Concerning the Aims and Purposes of the International Labour Organization*, art. I, 15 U.N.T.S. 35, ILO (Oct. 9, 1946) (announcing that "labor is not a commodity."). The Declaration proclaims:

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that lasting peace can be established only if it is based on social justice, the Conference affirms that all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective.

Id.

¹¹⁹ Erickson & Mitchell, *supra* note 47, at 50.

¹²⁰ *Id.* at 47; *see also* ILO, YOUR VOICE AT WORK: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT

nation has ratified the particular convention, every member nation is bound to abide by these principles and constitutional norms.¹²¹

Aside from the four fundamental principles endorsed by the ILO, a myriad of additional standards are often recommended as minimum requirements for the treatment of workers.¹²² Proposed standards usually encompass health and safety conditions and a minimum wage. These matters, however, are usually not included in the list of enforceable international core standards because the variations of norms among different nations, especially in Latin America, make it extremely difficult to establish uniform standards.¹²³

2. *The North American Agreement on Labor Cooperation*

The North American Agreement on Labor Cooperation (NAALC), the side labor agreement to NAFTA, contains eleven labor standards to which each member must adhere.¹²⁴ These include: (1) freedom of association and the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) prohibition of forced labor; (5) labor protections for children and young persons; (6) minimum employment standards (like minimum wages); (7) elimination of employment discrimination; (8) equal pay for equal work (male and female); (9) prevention of occupational injuries and illness; (10) compensation for such injuries or illness; and (11) the protection of migrant workers.¹²⁵ Significantly, the NAALC leaves these issues to be dealt with in accordance with the members' respective domestic policies, as it does not "establish common minimum standards for their domestic

WORK, <http://www.ilo.org/voice@work> (2000).

¹²¹ Compa, *supra* note 112, at 695.

¹²² MORAN, *supra* note 6, at 51; *see also* Blackett, *supra* note 16, at 26-27 (explaining that there has been a terminological shift from standards to rights in order to give prioritization to rights and to achieve a level of uniformity in standard setting).

¹²³ MORAN, *supra* note 6, at 51.

¹²⁴ Karla Shantel Jackson, *Is Anything Ever Free? NAFTA's Effect on Organizing Drives and Minorities and the Potential of FTAA Having a Similar Effect*, 4 SCHOLAR 307, 323 (2002) (explaining the fact that NAFTA itself did not initially contain labor provisions indicates efforts by labor rights proponents to append the agreement to reflect the importance of such standards).

¹²⁵ North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499, 1515 [hereinafter NAALC].

law.”¹²⁶ Thus, Mexican law lays the standards by which labor rights are addressed in that nation.

Mexico's labor laws are among the world's most comprehensive.¹²⁷ The Mexican Constitution of 1917 provides in article 123 that “[e]very person is entitled to suitable work that is socially useful and proceeds to establish specifications for ‘suitable’ work.”¹²⁸ It also provides that “[b]oth employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations, etc.”¹²⁹

Recent Mexican law also confirms the Constitution's commitment to the rights of workers. The 1970 Federal Labor Law expands protections by “regulating labor contracts, minimum wages and hours, year-end bonuses and profit sharing, workers' and employers' rights and obligations, employment of women and minors, and collective labor relation and strike procedures.”¹³⁰

¹²⁶ *Id.*

¹²⁷ *Isa, supra* note 56, at 186-87 (explaining that “under Mexico's federal labor laws, there shall not be established distinctions among workers for motives of race, sex, age, religious creed, political doctrine or social condition, so that employers cannot refuse to accept a worker for reason of age or sex.”).

¹²⁸ Deborah Greitzer, *Thirteenth Annual National Labor Law Writing Competition: Cross-Border Responses to Labor Repressions in North America*, 1995 DET. C.L. REV. 917, 919 (1995) (quoting Constitution Política de los Estados Unidos Mexicanos [CONST], Art.123 (Mex.), *translated in* ALBERT P. BLAUSTEIN & GIBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 97 (1982)).

The Mexican Constitution submits the following as ‘suitable’ working conditions: eight hours maximum work per day (§ (A)(I)); seven hours if during night hours (§ (A)(II)); prohibition of labor by children under 14 (§ (A)(III)); limitation of working hours of children between ages 14 and 16 (§ (A)(III)); maximum work week of six days (§ (A)(IV)); protection of women from excessive work during pregnancy, including six weeks leave prior to birth, six weeks after with full pay, and extra rest periods to allow for nursing (§ (A)(V)); equal pay for equal work (§ (A)(VII)); minimum wages (§ (A)(VI)); double pay for overtime and limits on length of overtime (§ (A)(XI)); protection against work injuries and against hazardous or unhygienic working conditions (§ (A)(XV)).

Id.

¹²⁹ *Id.* at 919-20 (explaining that the Mexican Constitution further includes provisions relating to lockouts, strikes, penalties to employers for dismissal without cause, and social security benefits).

¹³⁰ *Id.* at 920 (citing Ley Federal del Trabajo [Federal Labor Law (L.F.T.)], D.O., *translated in* COMMERCIAL LAWS OF THE WORLD: MEXICO LABOR LAWS (Foreign Tax

Moreover, Mexican law "requires certain employers to offer profit sharing to workers, while the other two NAFTA countries do not."¹³¹ Mexico also employs relatively advanced health and safety laws, as well as health and safety inspectors to monitor workplace conditions.¹³²

As a signatory member of seventy-four ILO conventions, including Convention 87, "Freedom of Association and Protection of the Right to Organize," Mexico has availed itself of the ILO's laws and protections, granting Mexican maquiladora workers remedies for labor violations on an international level.¹³³ The law of Mexico seemingly reflects a "commitment of the country to the rights of its labor force,"¹³⁴ however, the legislative intent underlying these laws was not a desire to benefit workers.¹³⁵

3. *The Caribbean Basin Initiative*

The CBI of 1983 encompasses standards¹³⁶ that, in order to qualify for its preferential duty treatment, each member nation must take steps to grant internationally recognized workers' rights.¹³⁷ These rights include "the right of association, the ability to organize and bargain collectively, a prohibition against any form of forced labor, a minimum age for employment of children, and acceptable conditions in terms of wages, hours, and occupational safety and health."¹³⁸

Law Publishers 1995).

¹³¹ Erickson & Mitchell, *supra* note 47, at 57-58.

¹³² *Workers, Profits, and Trade*, *supra* note 1, at 52.

¹³³ Greitzer, *supra* note 128, at 920 (noting that Mexico's ratification of ILO Convention 87, which was ratified by the ILO in 1948, was published in the *Diario Oficial de la Nacion* on October 16, 1950).

¹³⁴ *Id.*

¹³⁵ *Id.* (pointing out that "[t]he Mexican legal system recognizes the absolute right of ownership of industry and commerce as the basis of Mexican society, accepting that those who control capital must necessarily be driven by the goal of profit, 'otherwise they would be doomed to stagnation and failure.'").

¹³⁶ See Erickson & Mitchell, *supra* note 47, at 50.

¹³⁷ Sheppard, *supra* note 77, at 151.

¹³⁸ *Id.* at 139, 151 (explaining that other standards include that member nations: (1) cannot be communist; (2) may not take measures that have the effect of nationalizing, expropriating, or seizing property owned by U.S. citizens or companies without prompt and adequate compensation; (3) must act in good faith in recognizing and enforcing arbitral awards in favor of U.S. citizens or companies; and (4) must provide effective

Moreover, an amendment to the CBERA of 1990 expanded the workers' rights clause to comport with the Generalized System of Preferences (GSP).¹³⁹ These provisions, though, offer little guidance as to what constitutes progress in guaranteeing labor rights.¹⁴⁰ None of the provisions in the CBI define "reasonable workplace conditions" or the "right to organize or bargain collectively."¹⁴¹ The CBI's "substantive failure to define labor standards allow those responsible for granting beneficiary status to lose their accountability in the designation process."¹⁴² "The result is that standards in effect become mutable, allowing changing domestic conditions, and not foreign labor conditions, to be as important in determining whether to grant beneficiary status to an eligible country."¹⁴³

The Dominican Republic is also a signatory to ILO conventions.¹⁴⁴ Like Costa Rica, a fundamental principle of the Labor Code of the Dominican Republic is that labor law is to apply equally to nationals and foreigners.¹⁴⁵

Still applicable today, the Labor Code of 1952 forms the labor law of the Dominican Republic.¹⁴⁶ Pursuant to the Labor Code, it is the duty of the employer to:

- (1) maintain the factories, . . . and other places in which work is done in the condition required by the health regulations; (2) to freely provide for the workers the preventative medicines demanded by the health authorities . . . ; (3) to observe adequate safety standards and those measures required by law to prevent accidents in the use of machinery, instruments and work

protection of intellectual property rights).

¹³⁹ See 19 U.S.C. § 2461 (1996); see also, Compa, *supra* note 112, at 693 n.40 ("The GSP program permits a developing country to export goods to the United States on a preferential, duty free basis as long as the country meets the conditions for eligibility in the program.").

¹⁴⁰ Bittens, *supra* note 71, at 166.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Michelle E. Gordon, *Haitian Forced Labor in the Dominican Republic*, 15 COMP. LAB. L.J. 206, 209 (1994).

¹⁴⁵ *Id.* at 214 (noting that legally contracted Haitian "braceros" are entitled to all of the benefits of Dominican labor law).

¹⁴⁶ *Id.*

materials; . . . (8) to treat the worker with consideration, refraining from bad treatment of him in works or deeds; (9) to meet all the obligations that the Code imposes on them, as well as those derived from other laws, from the labor contract, from collective agreements and from internal regulations.¹⁴⁷

Costa Rica's domestic labor law is truly attractive to foreign investors. Though not overtly against them, traditional labor unions represent only 2% of the private-sector workforce.¹⁴⁸ In their place, "solidarity groups constitute the main form of labor organization, comprising 1,800 organizations and representing 24% of the private-sector workforce."¹⁴⁹ Solidarity groups cannot strike or bargain collectively, but they do offer members low-cost housing, credit, partial control over pension funds, and other benefits in exchange for 5% of the workers' paychecks.¹⁵⁰

4. *Corporate Codes of Conduct*

Recent controversies with well-known brands like Nike and The Gap have compelled U.S. companies, especially those that invest heavily in developing nations where their products are made, to lay down labor standards similar to those found in the industrialized world. Thus, companies themselves have created corporate codes of conduct, which act as minimal labor standards for their subsidiaries or subcontractors.¹⁵¹

At best, these standards "obligate foreign subsidiaries or subcontractors to comply with international norms and domestic laws, or risk losing their commercial relationship with the parent company."¹⁵² Often, however, U.S. and foreign plant management in Latin American countries design minimal workplace conditions, collective bargaining, and other standards that reflect bargaining conditions on management's own terms.

¹⁴⁷ *Id.* at 214-15 (discussing that the employer must also "pay the agreed wages effectively, completely, and in the way, time and place agreed. The payment of wages is not to be deferred for periods longer than one month.").

¹⁴⁸ Ferrate, *supra* note 93, at 141.

¹⁴⁹ *Id.* ("Solidarity groups, founded on a Roman Catholic doctrine stressing workplace harmony, benefit foreign investors by fostering a non-confrontational relationship between employers and employees.").

¹⁵⁰ *Id.*

¹⁵¹ See Compa, *supra* note 112, at 702.

¹⁵² *Id.*

E. Enforcement of Labor Standards

Labor standards set the foundation for the recognition of workers' rights. Enforcement of these standards, however, is essential to assuring the proper implementation of FDI in EPZs and maquiladoras. Compliance requires a mechanism to enforce these standards and an appropriate forum to settle labor-related disputes.

1. International Enforcement

Although considered the most comprehensive system for overseeing labor standards and international norms, the ILO's complaint mechanisms are limited indeed.¹⁵³ Complaints may only be filed by trade organizations, employer organizations, or governments, and with the exception of "core" human rights, may only allege violations by another government if both nations have ratified the pertinent convention.¹⁵⁴ Regrettably, the ILO, despite its long reach "on economic matters, is not linked to dispute resolution mechanisms of the world trading system."¹⁵⁵

By contrast, the World Trade Organization (WTO) stands alone as the flagship organization of trade standards enforcement. The WTO was formed out of the Uruguay Rounds of the late 1980s and early 1990s as a response to the globalization of world markets.¹⁵⁶ It "occupies a powerful and authoritative position in adjudicating disputes and imposing penalties on its members."¹⁵⁷

Subsequently, in the area of labor standards, it could play a significant role, "acting on behalf of the common good and overcoming the collective-action problems – cheating and free-riding – that plague voluntary mechanisms" in place in Latin

¹⁵³ See *id.* at 706-07.

¹⁵⁴ *Id.* (explaining that every nation must report annually on its progress of ratifying ILO conventions).

¹⁵⁵ Blackett, *supra* note 16, at 34; see also Gordon, *supra* note 144, at 209 (pointing out that the ILO investigated a situation in the Dominican Republic in 1983 where it specifically found the country in violation of Convention 105, the Prohibition of Compulsory Labor, but it did little to remedy the situation).

¹⁵⁶ See Robert Howse, *The World Trade Organization and the Protection of Worker's Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 136 (1999).

¹⁵⁷ MORAN, *supra* note 6, at 66.

America.¹⁵⁸ The WTO's main role with respect to labor standards is to use trade measures to put economic pressure on countries or firms to comply with such standards.¹⁵⁹ The WTO's two principal means of enforcing core labor standards are trade sanctions and fines.¹⁶⁰

First, forcing plants with substandard labor practices to improve their behavior by imposing trade sanctions on an entire EPZ may unduly multiply the number of labor victims and undermine other mechanisms that may be in place.¹⁶¹ For example, "an EPZ-wide action against a garment subcontractor in the La Romana zone of the Dominican Republic would cut off exports from foreign-owned electronics plants in the same zone, which pay higher-than-average wages and provide superior work conditions."¹⁶²

On the other hand, "when sanctions fail to induce any policy change in the targeted country," global sales of products that are manufactured with serious labor rights abuses may fall, affecting the company's bottom line.¹⁶³ Rivals with plants "in compliance with fundamental labor rights obligations will simply expand their market shares."¹⁶⁴

The threat of sanctions, combined with activism by labor groups, can operate more effectively than sanctions alone.¹⁶⁵ Such actions by an indigenous labor group led to the lifting of legal

¹⁵⁸ *Id.* at 66-67.

¹⁵⁹ Howse, *supra* note 156, at 147 (explaining that WTO agreements, such as the Government Procurement Agreement, makes adherence to certain labor rights or labor policies a condition for government contracting).

¹⁶⁰ MORAN, *supra* note 6, at 67.

¹⁶¹ *Id.* at 69; *see also* Howse, *supra* note 156, at 156 (quoting KEITH E. MASKUS, SHOULD CORE LABOR STANDARDS BE IMPOSED THROUGH INTERNATIONAL TRADE POLICY? 19-21 (World Bank, Policy Research Working Paper No. 1817, 1997)) ("The impacts of trade restrictions taken by foreign countries depend on the circumstances . . . such as whether the sector with weak rights is labor-intensive, whether it is the exportable sector, and what linkages there are to the informal or residual employment sectors.").

¹⁶² MORAN, *supra* note 6, at 69.

¹⁶³ Howse, *supra* note 156, at 155 ("If the country or group of countries imposing sanctions constitutes a major market for the products in question, then global demand will now be met through production that complies with the standards in question.").

¹⁶⁴ *Id.* at 156.

¹⁶⁵ *See id.* at 159.

restrictions on collective bargaining in the Dominican Republic.¹⁶⁶ Lamentably, the inherent perils connected with trade sanctions to enforce labor standards have directed more interest in the notion of using fines or monetary assessments to accomplish the same objective.¹⁶⁷

Fines instituted by the WTO against a firm for failing to comply with international norms have the consequence of directly affecting a firm's bottom line. The incentive to comply is lessened, however, for multinational conglomerates whose substantial coffers can withstand the implementation of severe financial penalties against it. As a result, an alternative option might be to require the national government to pay the fine, with the host country passing on the fine to the offending firm.¹⁶⁸

A means seldom addressed by the WTO of enforcing core labor standards is social labeling, where consumers express their "moral preferences for labor rights protections."¹⁶⁹ To garner credibility, though, these labels must guarantee that legislation has, in reality, been complied with.¹⁷⁰ Current WTO procedures, however, do not provide such a guarantee because there is no way of carrying out on-the-spot inspections reliably or independently.¹⁷¹

In the end, the WTO's limited staff and lack of expertise in labor affairs leave it ill-equipped to monitor labor standards.¹⁷² Some suggest a joint ILO-WTO endeavor with the "primary role for judging compliance and providing technical advice and expertise left to the ILO,"¹⁷³ as the WTO neither specializes in labor, nor champions laborers' rights like the ILO.¹⁷⁴

¹⁶⁶ *Id.*; see also Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165, 170 (1993).

¹⁶⁷ MORAN, *supra* note 6, at 73; see also Isa, *supra* note 56, at 213 (stating that trade sanctions hamper free trade and are usually a measure of last resort).

¹⁶⁸ MORAN, *supra* note 6, at 75.

¹⁶⁹ Howse, *supra* note 156, at 160.

¹⁷⁰ *Id.* at 161.

¹⁷¹ See *id.* at 159.

¹⁷² Erickson & Mitchell, *supra* note 47, at 49.

¹⁷³ *Id.*

¹⁷⁴ See Blackett, *supra* note 16, at 40-41 ("New labor standards in the ILO may be adopted by only a two-thirds vote of the membership, as opposed to a consensus vote in the WTO.").

Regardless of the international organization involved, "the broader the enforcement mechanism, the more likely it is to undermine the transition from lowest-skill to higher-skill operation – and to offer protectionist interests in the developed world an opportunity to turn dispute-settlement procedures to their own ends."¹⁷⁵

2. *North American Agreement on Labor Cooperation Enforcement*

Under the NAALC, each member country is assigned a National Administrative Office (NAO), an agency within each nation's labor department that is responsible for the NAALC's administration and management.¹⁷⁶ Under the NAALC rules, a complaint may be filed by any person, trade union, non-governmental organization (NGO) or other organization of the country that seeks review of another country's alleged failure to meet any of the NAALC's eleven labor principles.¹⁷⁷

Moreover, article three of the NAALC "requires effective appropriate government action to provide labor protection," while article four permits a private right of action.¹⁷⁸ As a final penalty, the panel "may suspend... the application to the Party complained against of NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment."¹⁷⁹

In practice, however, injured Mexican laborers are rarely remedied. According to NAO procedures after an initial complaint, the opposing nation's labor law enforcement is reviewed and a report is distributed that offers criticism in an attempt to generate change.¹⁸⁰ At most, though, the report creates

¹⁷⁵ MORAN, *supra* note 6, at 67.

¹⁷⁶ NAALC, *supra* note 125, § C, art. 15.

¹⁷⁷ See Compa, *supra* note 112, at 704; see also NAALC, *supra* note 125, art. 29-39(4)(b), Annex 39 (stating that the complainant party may make a "request for an Arbitral Panel," which "may, where warranted, impose a monetary enforcement assessment.").

¹⁷⁸ Isa, *supra* note 56, at 191-92 (noting that NAALC's article four "does not provide any mechanisms to enforce such a right of action.").

¹⁷⁹ NAALC, *supra* note 125, art. 41.

¹⁸⁰ See Compa, *supra* note 112, at 705.

bad or embarrassing publicity that tries to compel a government or employer to change its behavior, without enforcing its laws.¹⁸¹

In effect, the NAALC's "domestic standards" policy allows Mexico to reduce its minimum wage or cut social insurance and job security protections free of consequence.¹⁸² It designates no punishment against the Mexican government when its domestic laws and practices fall short of compliance with internationally recognized labor standards.¹⁸³

Additionally, "the NAALC has been ineffective in assuring that the Mexican government allows workers to effectively exercise their constitutional rights of free association and collective bargaining through independent unions of their own choosing."¹⁸⁴ As a response, workers at many plants have formed their own unions. Mexican federal judges have repeatedly upheld the legality of these unions and their ensuing labor strikes.¹⁸⁵ Local labor boards, however, have consistently placed obstacles in the unions' efforts to register and to strike against foreign-owned maquiladoras.¹⁸⁶

Some unions in Mexico have filed complaints under the NAALC, yet they have not been recognized. There is little incentive to enforce the rights of workers under the law in Mexico, because NAFTA's primary purpose is to create favorable conditions for investment.

Consequently, several years after the signing of the NAALC, there has been little assurance that Mexico will enforce its constitution or laws guaranteeing workers their most basic labor

¹⁸¹ See *id.* at 708.

¹⁸² See *id.* at 689.

¹⁸³ See *id.*; see also Erickson & Mitchell, *supra* note 47, at 57 (explaining that a commonly expressed fear in drafting NAALC "was that low Mexican labor standards would pull down those of Canada and the U.S.").

¹⁸⁴ Jerome Levinson, *Certifying International Workers Rights: A Practical Alternative*, 20 COMP. LAB. L. & POL'Y J. 401, 402-03 (1999) (stating that President Clinton "agreed to delete . . . the NAALC provisions that provided for the possibility of trade sanctions and monetary penalties for a persistent failure of a party to the NAALC to enforce its own labor laws with respect to freedom of association, collective bargaining, and the right to strike.").

¹⁸⁵ *Workers, Profits, and Trade*, *supra* note 1, at 50.

¹⁸⁶ *Id.*

rights.¹⁸⁷ Because there are few internal incentives to do so, outside pressure from NAFTA members under the NAALC is imperative to expose Mexico's non-enforcement and to compel future enforcement of its labor laws.¹⁸⁸ Unfortunately, the Mexican government has put itself in the position to be "both judge and party of the . . . conflicts."¹⁸⁹

3. *Caribbean Basin Initiative Enforcement*

Unlike the NAALC, "the CBI does not contain procedures by which unions or human rights groups may petition for a review of a country's beneficiary status."¹⁹⁰ In fact, the labor rights provisions are non-binding.¹⁹¹ The President is not required to revoke the country's beneficiary status, but merely puts beneficiary countries on notice that respect for workers' rights is expected, rendering the workers' rights provision legally meaningless.¹⁹²

On the other hand, the Costa Rican legislature passed legislation prohibiting any activities that hindered the formation and operation of trade unions in the EPZs or elsewhere.¹⁹³ In fact, at their request, the ILO undertook two missions to help prepare labor statutes that would "protect against any infringements of trade-union rights."¹⁹⁴

In the Dominican Republic, however, there have been ongoing complaints to the ILO that wages are set without formal collective bargaining.¹⁹⁵ Workers have looked to the nation's own Labor Code, which provides sanctions to ensure that employers comply with these obligations, for remedies.¹⁹⁶

¹⁸⁷ Levinson, *supra* note 184, at 403.

¹⁸⁸ Isa, *supra* note 56, at 204.

¹⁸⁹ Greitzer, *supra* note 128, at 921.

¹⁹⁰ Bittens, *supra* note 71, at 166; *see also* 19 U.S.C. § 2702 (1989).

¹⁹¹ Bittens, *supra* note 71, at 166.

¹⁹² *Id.*

¹⁹³ MORAN, *supra* note 6, at 42.

¹⁹⁴ *Id.* (quoting ILO, YOUR VOICE AT WORK: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 51 (2000)).

¹⁹⁵ *Id.* at 37.

¹⁹⁶ Gordon, *supra* note 144, at 215.

Under the Dominican Labor Code, a worker may appear before the labor authorities to protest against an employer's violations of his rights pursuant to his contract or the Code.¹⁹⁷ In the event that a violation is found, the employer may be subject to imprisonment, a fine, or both.¹⁹⁸

"The Labor Department, under the direction of the Secretary of State for Labor, is responsible for all matters relating to working time, legal rest periods, and the protection of wages, unions, and the labor contract."¹⁹⁹ Also, a labor inspectorate investigates complaints concerning the execution of labor contracts and laws that are submitted by aggrieved employers or workers.²⁰⁰

Recent labor reforms, however, and the government's constant failure to comply with them, led to successful strikes by some of the strongest unions.²⁰¹ "Troubled by the growing power of these unions, the government took active measures to avoid compliance with the new labor standards by increasing the recruitment of cheap, conciliatory labor from Haiti."²⁰² Thus, new labor reforms allowed the government to employ workers at lower wages, while subject to few demands, if any.

Lamentably, more and more employers throughout Latin America have deliberately provoked strikes to get rid of trade unions.²⁰³ Moreover, Dominican officials, like those of many Latin American nations, clearly have not enforced workers' rights

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* ("Article 86 of the Labor Code allows the employee to end his or her contract, resign, and then proceed to charge the employer according to the law. The non-fulfillment of any of the duties contained in Article 42 may be justification for a worker to resign, pursuant to Article 10.").

¹⁹⁹ *Id.*

²⁰⁰ Gordon, *supra* note 144, at 215.

The inspectors have the duty to watch over the correct application of the labour laws, rules and labour contracts, and are also authorized to enter freely and without previous notice any place in which there may be a violation of the laws or regulations relating to work . . . [and] to proceed with any examination or investigation that they consider necessary to convince themselves that the legal requirements are being observed. *Id.*

²⁰¹ *Id.*

²⁰² *Id.* (explaining that the inability of the Haitian braceros to unionize and to develop legal empowerment encouraged the government to employ them in increasing numbers and to disregard union demands pursuant to the new labor reforms).

²⁰³ MORAN, *supra* note 6, at 60.

in the maquiladoras, further demonstrating that there are good laws, but there are serious problems with compliance.²⁰⁴

4. *Enforcement at the Plant*

"Depending on the country, labor law enforcement may be weak, underfunded, or corrupt,"²⁰⁵ leaving firms themselves to abide by internationally and nationally recognized labor standards. Nevertheless, increased public pressure on corporations may be the only means by which to improve the way companies treat their workers.²⁰⁶ Regrettably, firms may have difficulty in ensuring the good treatment of workers at plants whose workers number in the thousands and sometimes tens of thousands, or particularly where labor conditions of their contractors are difficult to ascertain.²⁰⁷

In terms of earnings, legal minimum wages are often not enforced.²⁰⁸ A mandatory global minimum wage for maquiladora workers uniform throughout the developing world would unfortunately hit the poorest countries with the lowest skilled workers, like Mexico and the Dominican Republic, the hardest.²⁰⁹ That is because management is usually under considerable pressure to keep labor costs down at Latin American EPZs and to be on the lookout for new production sites where the combination of wage and productivity levels might be more favorable.²¹⁰

Furthermore, because female employees seem to be the preferred workers by maquiladora operators,²¹¹ the relaxed enforcement of women's labor rights continues to be a "black eye" for foreign investors. For instance, the Women's Rights Division of Human Rights Watch reported that women workers in maquiladoras, such as the General Motors plant in Mexico, "are given pregnancy exams as a condition of being hired, are tested regularly for pregnancy throughout their employment, and that

²⁰⁴ See *Workers, Profits, and Trade*, *supra* note 1, at 52.

²⁰⁵ Compa, *supra* note 112, at 702.

²⁰⁶ Isa, *supra* note 56, at 215.

²⁰⁷ MORAN, *supra* note 6, at 72.

²⁰⁸ *Id.* at 52.

²⁰⁹ *Id.* (contending that a universal minimum wage would deprive developing countries of the opportunity to use their cheap labor to penetrate external markets).

²¹⁰ *Id.* at 53.

²¹¹ Peters, *supra* note 3, at 228.

pregnant workers are fired.”²¹² While these actions are illegal under both Mexican law and ILO standards, the Mexican government has not taken any action to enforce its laws in this and many other instances because of the negative repercussions it would create in its FDI by adopting a policy of strict enforcement.²¹³

American consumers testify that, ultimately, they would be willing to spend one to five dollars more for a twenty-dollar item manufactured under good working conditions.²¹⁴ Accordingly, enforcement of good working conditions and fair wages for laborers in maquiladoras and EPZs is an investment, usually in “creating a reputation for socially responsible behavior on a range of race, gender, and labor issues.”²¹⁵ Maquiladora operators should take heed of these consumer demands.

V. Summary of Benefits and Burdens of the Maquiladora Enclave

Latin American nations have certainly benefited from U.S. investment in maquiladora labor. Arguably though, the benefits to U.S. investors have far outweighed those of Latin American laborers. Eventually, the future of FDI into Latin America and a healthy long-term relationship with its neighbor to the north depends on an equal balance between seeking economic advantages and meeting satisfactory conditions for laborers.

A. Applying Economic Theory

Once countries engage in international trade and investment, their economies are significantly linked.²¹⁶ The ensuing competition among nations leads to policy changes that can garner a comparative advantage in trade, but that can also be very

²¹² Cynthia A. Williams, *Corporate Social Responsibility in an Era of Globalization*, 35 U.C. DAVIS L. REV. 705, 740 n.117 (2002) (quoting *No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, 8 HUM. RTS. WATCH, Report No. 6(B), Aug. 1996).

²¹³ *Id.*

²¹⁴ MORAN, *supra* note 6, at 57 (quoting KIMBERLY A. ELLIOTT & RICHARD B. FREEMAN, NAT'L BUREAU OF ECON. RESEARCH, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy* (2001)).

²¹⁵ *Id.* at 56.

²¹⁶ Erickson & Mitchell, *supra* note 47, at 43.

detrimental to laborers' rights. In essence, violating workers' rights should not be a means of gaining a comparative advantage in trade and investment.²¹⁷

Developing countries often protect sectors in which they are likely to have a comparative advantage, such as in the cases of most Latin American countries, in sectors with a high share of unskilled workers.²¹⁸ For Mexico and the Dominican Republic, the pattern of protection is skewed toward export-intensive, maquiladora sectors.²¹⁹ Although Mexico's and the Dominican Republic's comparative advantage in labor is a key reason that maquiladoras are located there, the notion that maquiladoras will leave if labor laws are enforced is dubious.²²⁰ Non-labor costs of business make labor a less-determinative factor in where a plant is located.²²¹

As a result, Mexico has a significant trade advantage with the easier and cheaper transportation between Mexico and the United States versus that between the Dominican Republic, Costa Rica or other Latin American nations to the United States.²²² "That quick turnaround helps Mexico compete in products that require customization."²²³

International policy also has a profound impact on a nation's comparative advantage over others. For example, after the implementation of the third phase of the CBI in 2000, foreign investment arrangements began to relocate to the Caribbean, leading to greater economic diversification in the region.²²⁴ Goods

²¹⁷ See Compa, *supra* note 112, at 692 ("Nations should not gain a competitive advantage in global trade by killing union organizers, banning strikes, using forced labor . . . or otherwise violating workers' rights.").

²¹⁸ Hanson & Harrison, *supra* note 45, at 280.

²¹⁹ *Id.*

²²⁰ Isa, *supra* note 56, at 200 ("For example, the automobile industry is labor intensive and needs large numbers of workers, but other expenditures for capital and infrastructure development are also essential.").

²²¹ *Id.*

²²² Sheppard, *supra* note 77, at 148; see also Gray & Jarosz, *supra* note 27, at 10 (explaining that "location advantages help explain why a firm chooses state A over state B as the site for a new factory.").

²²³ Joel Millman & David Luhnaw, *A Decade After NAFTA, Prospects for Mexico Seem to Be Dimming*, WALL ST. J., Apr. 21, 2003, at A2.

²²⁴ Sheppard, *supra* note 77, at 160.

in which the Dominican Republic and other Caribbean basin nations have a comparative advantage gained favor with U.S. markets.²²⁵

Under the theory of comparative advantage, technology is assumed to be the same everywhere and equally accessible to all nations, although realistically "available technology may not be the same in all geographic areas. . . ." ²²⁶ In this sense, Costa Rica has stepped ahead of its Latin American competitors by tailoring its economic and social policy to reflect a growing emphasis on technology training. This, along with its proximity to the United States, has put the nation in a strong position to receive future FDI in high-skilled areas. "One of the basic political characteristics of the 'law' of comparative advantage is that . . . it concerns itself solely with increasing wealth . . . and ignores any question about the distribution of that wealth." ²²⁷ Fundamentally, it is a political strategy indicating a preference for minimal government. ²²⁸

Here, "particular attention should be paid to the ways that international policies affect groups that have traditionally faced discrimination." ²²⁹ Governments seeking to lower wages argue that compensation must be permitted to vary with productivity in order for each nation to be able to exploit the comparative advantages of its own economy. ²³⁰ They also argue that strict enforcement of safety and health laws in plants discourages investment and ultimately raises the cost of running a plant.

To the contrary, respect for fundamental labor rights does not lead to a commercial disadvantage in relation to employers who fail to respect such fundamental rights. ²³¹ As a matter of fact, higher labor standards increase competitiveness and

²²⁵ See *id.* at 161.

²²⁶ Davis & Neacsu, *supra* note 9, at 770.

²²⁷ See *id.* at 757; see also IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD ECONOMY* 285 (1979) (noting that comparative advantage is merely a political theory, not a scientific or economic one).

²²⁸ Davis & Neacsu, *supra* note 3, at 758.

²²⁹ Blackett, *supra* note 16, at 23 ("For example, gender inequalities may affect macroeconomic and trade policy outcomes."). This is especially important as women outnumber men in low-wage positions at maquiladoras and EPZs. *Id.*

²³⁰ MORAN, *supra* note 6, at 54.

²³¹ See Howse, *supra* note 156, at 160.

productivity.²³² On the other hand, high accident rates stem from “a lack of training for the workers, and intense pressure for higher production.”²³³ This evidence is a strong indication that “any comparative advantage gained” from constraining labor rights “ought to be rejected.”²³⁴

B. The Future of Investment in Latin America

FDI is a dominant element of the world economy.²³⁵ It is “clearly necessary for the overall economic development of the Caribbean Basin nations” and particularly for achieving the stated purposes of agreements like NAFTA and the CBI.²³⁶ Currently though, many obstacles prevent all parties involved from benefiting from FDI.

For instance, the terrorist events in the United States on September 11, 2001, have proven detrimental to the economies of Latin America.²³⁷ The subsequent slowdown of the U.S. economy and military operations in the Middle East has led many American firms to halt investment in overseas plants.

In 2002, FDI in Latin America and the Caribbean fell by 33%, the third straight annual drop, and a further slide is expected this year.²³⁸ The Mexican maquiladora industry continues to struggle after eliminating half-a-million jobs in 2002.²³⁹ The Caribbean economies have seen drastic drops in FDI revenue due to risk aversion.²⁴⁰ As FDI in the region declines at an alarming

²³² Blackett, *supra* note 16, at 49.

²³³ *Workers, Profits, and Trade*, *supra* note 1, at 52.

²³⁴ Blackett, *supra* note 16, at 17.

²³⁵ Cristina Baez et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. REV. 183, 194 (2000).

²³⁶ Dypski, *supra* note 38, at 115; *see also* U.S. GOV'T PRINTING OFFICE, THE CARIBBEAN BASIN: ECONOMIC AND SECURITY ISSUES, S. Print No. 102-110, at 332 (1993) (quoting President Reagan in a February 1982 speech before the Organization of American States on the importance of foreign trade to Latin America).

²³⁷ Sheppard, *supra* note 40, at 37.

²³⁸ *Foreign Investment in Latin America Drops 33%*, WALL ST. J., Apr. 9, 2003, at A10; *see also*, Sheppard, *supra* note 40, at 71 (reporting that FDI in the area totaled \$56.7 billion in 2002, down from \$84 billion a year earlier).

²³⁹ Sheppard, *supra* note 77, at 166.

²⁴⁰ *Id.* at 167.

rate,²⁴¹ Latin America has found itself suddenly ignored.²⁴²

The exposure of Latin America to competition from China and other countries that have abundant unskilled labor also appears to have contributed to a decrease in FDI.²⁴³ In 2002, China received a record \$52 billion in FDI, up 56.7% from the previous year.²⁴⁴ Marketwise, Latin American maquiladoras are losing garment assembly and other low-tech work to Asia.²⁴⁵ In fact, Mexico itself "has nearly lost the battle on low-skilled, labor-intensive industries."²⁴⁶

The Costa Rican example illustrates how important highly proactive investment-promotion strategies are in the attraction of sophisticated international investments.²⁴⁷ Technological advances have undoubtedly played an integral role in triggering investment into its high tech ready facilities and labor pools.²⁴⁸ The declining use of skilled labor, however, is shifting investment to sectors with lower-cost labor, migrating abroad to the Asian labor pool.²⁴⁹

Faced with this precarious situation, Latin American governments have taken significant measures to attract American investment.²⁵⁰ The Mexican government recently paid a "U.S. company \$16 million to avoid an extended legal battle to establish a hazardous waste treatment plant to avoid scaring away other international investors from landing in Mexico."²⁵¹

²⁴¹ *Id.*

²⁴² Sheppard, *supra* note 40, at 71.

²⁴³ Hanson & Harrison, *supra* note 45, at 287.

²⁴⁴ Owen Brown, *Foreign Investment in China Surges 56.7%*, WALL ST. J., Apr. 15, 2003, at A13.

²⁴⁵ See Millman & Luhnnow, *supra* note 223.

²⁴⁶ *Id.*

²⁴⁷ MORAN, *supra* note 6, at 38.

²⁴⁸ See Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375, 387 (1996) (quoting Bijit Bora, Economic Planning Advisory Commission, *The Implications of Globalisation for Australian Foreign Investment Policy*, in GLOBALIZATION: ISSUES FOR AUSTRALIA 92 (1995)).

²⁴⁹ Hanson & Harrison, *supra* note 45, at 277.

²⁵⁰ Sheppard, *supra* note 40, at 56.

²⁵¹ *Id.* at 46, 56 (remarking that Mexico also faces dilemmas with U.S. drug policy, as its cartels account for over 65 percent of all the illegal drugs smuggled into the United States).

The economic slowdown has had the worst effect on maquiladora workers who have lost their jobs or have had their hours curtailed in attempts by companies to minimize costs and avoid bankruptcy.²⁵² In one example, the Hitachi Consumer Products de Mexico plant recently suspended over 3,000 workers to account for its delayed shipping.²⁵³ Many of these fired workers already live at or below the poverty line in Mexico, causing a "ripple effect on most city businesses and leaving the provincial, border governments in a 'state of [economic] emergency.'"²⁵⁴

On the bright side, the rate of loss of maquiladora jobs is expected to decrease for 2004.²⁵⁵ Also, "[t]he Bush Administration has identified the negotiation and completion of the Free Trade Area of the Americas (FTAA) by 2005 as one of its primary goals on the international trade agenda."²⁵⁶ The FTAA, if implemented, will surely bring a windfall of FDI to all Latin American nations whose skilled and unskilled labor pools thirst for roles in U.S. industries. Recent developments in world events, however, have pushed negotiations of the FTAA aside in favor of more pressing issues affecting U.S. interests like terrorism and domestic economic policy.

C. Reconciling Laborers' Rights With Foreign Direct Investment

Labor rights are usually bargained-for conditions of FDI into Latin America. Therefore, it is not absolutely necessary to subjugate labor rights in order to attract and maintain FDI. Yet, most Latin American governments give in to the wishes of U.S. companies to lower labor standards in order to receive the vast capital and employment opportunities that U.S. firms can offer. This essentially gives U.S. interests the strongest position to protect worker's rights throughout the Western Hemisphere. The

²⁵² *Id.* at 60.

²⁵³ *Id.*

²⁵⁴ Sheppard, *supra* note 40, at 61 (quoting Mary Jordan, *Mexico's El Dorado Loses Its Luster; Border Economy Slows with U.S.*, WASH. POST, Sept. 20, 2001, at A30).

²⁵⁵ See Joel Millman, *Mexico's Maquiladoras May Be Putting Together a Comeback*, WALL ST. J., July 25, 2003, at A12.

²⁵⁶ Sheppard, *supra* note 77, at 143 ("The FTAA . . . will be a free trade zone encompassing the thirty-four democratic nations of the western hemisphere.").

United States, by fulfilling a number of objectives, can and should lead Latin America in setting and maintaining labor standards.

First, the United States can do much to improve the political institutions of Latin America. Countries like the Dominican Republic and Mexico, whose decades-long reign of the political party PRI was notorious for corruption, resemble most states in Latin America, where authoritarian governments have limited citizens' access to markets, capital, and employment. Using Costa Rica as an example, though, U.S. encouragement of government development in Latin America will lead to fairer employment practices and greater democratization, and allow for greater individual liberties. Of course, other factors, including financial assistance, could aid in this development, but ultimately, economic success cannot occur in Latin America without political reform.

Second, the U.S. government should take a greater role in protecting workers' rights in bilateral or multilateral treaties. Laborers in many Latin America countries are regularly fired for attempting to organize, for demanding better work conditions, or for being pregnant. With its silence, the United States has clearly not taken the "appropriate government action" as outlined in article three of the NAALC, to provide for labor protections to, *inter alia*, maquiladora workers. As a nation that touts its own history of labor protections, the United States should play a proactive role in establishing concrete minimum labor standards.

For example, rather than allowing workers' complaints to be assessed by inexperienced, non-judicial officers in NAOs through the NAALC, or to not be assessed at all like in the CBI, subsequent economic agreements should call for harmonized, binding labor laws among signatory nations. This is increasingly important as the FTAA, along with the current negotiations for the Central American Free Trade Agreement (CAFTA), confirm that Latin American nations are indeed seeking to increase FDI to stimulate their economies and raise living standards. Yet, without a clear, resounding push to harmonize labor standards from the United States, which is undoubtedly the most powerful influence at the bargaining table, workers' rights in Latin America will continue to be subjugated to the flow of U.S. capital.

Third, U.S. organizations can be a determinative influence in directing Latin American nations to protect workers' rights. American labor unions, which have long championed workers'

rights in the United States, can aid their Latin American counterparts by publicly providing support during strikes.²⁵⁷ NGOs, which have been instrumental in past decades in protecting the human rights of Latin Americans, could recognize that violating laborers' rights falls within the scope of abuses that they are trying to prevent.

In the end, however, it is up to the American consumer to decide the direction that rights for workers in maquiladoras and EPZs will take. Unfortunately, consumers seldom inquire into the origin or assembly of widely popular products. When reports of deplorable work conditions in Latin America surfaced in the recent past, the public emerged with outcries of injustice. The resulting public protests and mass boycott strategies against brand names like Nike and The Gap have effectively dissuaded American companies from wholly ignoring labor laws, and have been somewhat successful in assuring that workers' fundamental rights can and will be met.

VI. Conclusion

Franklin Delano Roosevelt said, "[t]he test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."²⁵⁸ For women like Carmen Vazquez, factory work in a U.S.-owned maquiladora may provide a measure of autonomy, status, and self-respect that is otherwise hard to obtain as a housewife or domestic laborer.²⁵⁹

Since the maquiladora industry is indeed "constantly evolving, increasingly complex and very controversial,"²⁶⁰ investors and workers alike could benefit in the long run if practices are based as

²⁵⁷ See Karen Fleshman, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers' Contributions to Its Economy by Allowing Them to Work Legally*, 18 N.Y.L. SCH. J. HUM. RTS. 237, 262 (2002) (noting that there has been a complete and salient turnaround in the manner in which the AFL-CIO and other unions treat Latin Americans).

²⁵⁸ Ontiveros, *supra* note 10, at 38.

²⁵⁹ MORAN, *supra* note 6, at 15-16 ("As a result of higher female participation in the labor force, a higher proportion of household income is directed toward basic family such needs as health, nutrition, and education, which reduces the inter-generational transmission of poverty.").

²⁶⁰ *Workers, Profits, and Trade*, *supra* note 1, at 45.

equally on human values as they are on market values.²⁶¹ That said, Latin American economies need “to function for the benefit of . . . working people, not necessarily for the benefit of foreign investors, or certainly not exclusively for their benefit.”²⁶² A firm’s self-interest should lead it away from a strategy of labor suppression and toward measures designed to retain desirable workers.²⁶³

The reality today, though, is that Latin American labor law does not favor workers, but merely protects them as much as is necessary to prevent those who control capital from becoming too powerful.²⁶⁴ Consequently, the ultimate goal is to maintain the supremacy of the state.²⁶⁵ And the governments of those states do not enforce labor laws because of the false fear that their actions will discourage FDI. Even worse, non-action by the United States has made it clear that a failure to assure core worker rights in international agreements carries no penalties,²⁶⁶ even though it has had “substantial leverage” in encouraging improvements in labor rights through international treaties.²⁶⁷ Instead of reinforcing a “race to the bottom” for the sole purpose of attracting FDI, governments should encourage a “race to the top.”²⁶⁸

²⁶¹ See Ontiveros, *supra* note 10, at 31.

²⁶² *Workers, Profits, and Trade*, *supra* note 1, at 53.

²⁶³ MORAN, *supra* note 6, at 25.

²⁶⁴ Greitzer, *supra* note 128, at 921.

²⁶⁵ *Id.*

²⁶⁶ Levinson, *supra* note 184, at 404.

²⁶⁷ See Sheppard, *supra* note 77, at 153-54.

²⁶⁸ Levinson, *supra* note 184, at 407.

